Point Park University *and* Newspaper Guild of Pittsburgh/ Communications Workers of America Local 38061, AFL–CIO, CLC. Case 6–CA–34243

February 17, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 11, 2004, the General Counsel issued the complaint on August 31, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 6–RC–12276. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 7, 2004, the General Counsel filed a Motion for Summary Judgment. On October 13, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the General Counsel filed a reply to the Respondent's response.[1]

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its contentions in the representation case that its full-time faculty members are managerial employees within the meaning of *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. In its answer and its response to the Notice to Show Cause, the Respondent urges the Board to order a hearing and/or reopen the record in this case. The Respondent argues that the case was not fully litigated because the Board did not transfer the record in the representation case proceeding to its headquarters office in Washington, D.C., and therefore could not have meaningfully reviewed the Respondent's request for review of the Regional Director's Decision and Direction of Election. The Respondent also argues that the Board should reopen the record because the Union's failure to turn over documents pursuant to the Respondent's subpoena prejudiced the Respondent's case and prevented a full record from being established. The Respondent further maintains that a hearing should be held on the issue of whether this failure by the Union amounted to the improper suppression of evidence that would have been unfavorable to the Union. The Respondent contends that it later obtained copies of the missing documents, and that the hearing should be reopened to consider this "newly discovered" evidence. The Respondent argues that it was "excusably ignorant" of the contents of the missing documents, and acted with "reasonable diligence" in uncovering the records and presenting them to the Board.

In addition, the Respondent maintains that the Board should reopen the hearing in order to take evidence on certain changed circumstances since the close of the hearing, which are relevant to the issue of the managerial status of the faculty. The Respondent contends that since the close of the hearing, the faculty has exercised its managerial authority in a number of situations, and that this information is highly relevant and should be considered by the Board. Further, the Respondent argues that the Board should reopen the record to accept into evidence a report by the Middle States Association of Colleges and Schools, because this report contains information relevant to the managerial issue. Finally, the Respondent argues that the Board should stay the proceedings in this case, pending the issuance of the Board's decision on remand from the D.C. Circuit in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (2004).

We find no merit in the Respondent's arguments. The Respondent's contention that this case was not fully litigated because the Board did not transfer the record in the representation case proceeding to its headquarters office in Washington, D.C., is baseless. The representation case was fully litigated and the Board was able to duly consider the parties' positions without transferring the record to the headquarters office. Under Section 102.67 of the Board's Rules, a party seeking review has the responsibility for setting forth, in its request, the basis for seeking review. It is only after the Board has satisfied itself that review should be granted that the record is

[1] The Union filed a brief on November 30, 2004. The Respondent then filed a motion seeking to strike the Union's brief as untimely, pursuant to Sec. 102.111(b) of the Board's Rules and Regulations. The Union filed a reply, admitting that its brief was untimely, and submitting a motion that the Board accept its brief nunc pro tunc. The Respondent's motion to strike is granted, and the Union's motion is denied.

called for and reviewed. In the underlying representation case here, the Respondent failed to set forth a basis for granting review. Hence, the record was not reviewed.

The Respondent's argument that the Board should reopen the record in this case because the Union's failure to turn over documents pursuant to the Respondent's subpoena prejudiced the Respondent's case is also unfounded, in light of the fact that the Respondent never sought enforcement of the subpoena. Further, newly discovered evidence is evidence of facts in existence at the time of the hearing which could not be discovered by reasonable diligence.[2] We conclude that the Respondent did not act with reasonable diligence. The Respondent subpoenaed the documents on October 31, 2003. The subpoena was issued to the Faculty Assembly. However, the Union, apparently viewing the subpoena as addressed to it, responded with some of the subpoenaed documents. At that point, the Respondent could have sought full enforcement of the subpoena, but it did not do so. It was not until September 2004, that it obtained the remaining documents, apparently from the Faculty Assembly. By that time, the hearing had long since closed (January 16, 2004), and thus the documents were not a part of the record.

The Respondent, in response to the Motion for Summary Judgment, now seeks to introduce those documents as newly discovered. In our view, the Respondent did not act with "reasonable diligence" and thus cannot introduce these documents at this late date. When the Union failed to produce all of the documents pursuant to the subpoena of October 31, 2003, a reasonably diligent party would have sought enforcement at that time. Further, even after the Respondent procured the documents in September 2004, it did not immediately seek to reopen the case. It waited over 2 months, i.e., until after the instant Motion for Summary Judgment, to seek to reopen the record to receive the documents. In these circumstances, we conclude that the Respondent has not acted with reasonable diligence, and the Board should not reopen the representation case record to receive the documents.

In addition, the Respondent's assertion that the Board should reopen the hearing in order to take evidence on certain changed circumstances since the close of the hearing is also without merit. It is well established that the Board does not "determine voter eligibility on the basis of after-the-fact considerations." *Arlington Masonry Supply, Inc*., 339 NLRB 817, 820 fn. 15 (2003); *Georgia Pacific Corp*., 201 NLRB 831, 832 (1973). Further, the Respondent's contention that the Board should reopen the record to accept into evidence a report by the Middle States Association of Colleges and Schools is unfounded, because the Respondent does not argue that it was denied the opportunity to enter this document into the record at the time of the hearing.

Finally, the Respondent's argument that the Board should stay the proceedings in this case, pending the issuance of the Board's decision on remand from the D.C. Circuit in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (2004), is without merit. The Board addressed the *LeMoyne-Owen College* decision in its unpublished Order issued June 23, 2004, denying the Respondent's request for review except for permitting William Moushey to vote under challenge. The Board stated: "We are mindful of the Court of Appeals for the District of Columbia's decision in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (2004), that, in deciding the managerial status of the faculty here, we must consider how our disposition of this case is consistent with precedent. We find that the Regional Director's decision, which includes a thorough discussion of the facts and precedent, addresses the court's concerns."

Thus, the Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it identified any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[3] We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania nonprofit corporation, with an office and place of business in Pittsburgh, Pennsylvania, has been engaged in the operation of a private nonprofit liberal arts university.

During the 12-month period ending July 31, 2004, the Respondent, in conducting its operations described above, derived gross revenues, excluding contributions which, because of limitation by the grantor, are not available for operating expenses, in excess of $1 million.

[2] *Seder Foods Corp*., 286 NLRB 215, 216 (1987); *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363–364 (5th Cir. 1978).

[3] The Respondent's motion to reopen the record is therefore denied.

[4] Member Schaumber did not participate in the underlying representation proceeding. However, he agrees that the Respondent has not raised any new matters warranting a hearing in this proceeding, and that summary judgment is therefore appropriate.

During the same 12-month period ending July 31, 2004, the Respondent, in conducting its operations described above, purchased and received at its Pittsburgh, Pennsylvania facility, products, goods, and materials valued in excess of $5000 directly from points located outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held May 26, 2004, the Union was certified on July 9, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time faculty, Conservatory of Performing Arts teaching artists, Natural Sciences and Engineering Technology laboratory associates, Director of the Library, Head of Graduate Studies in COPA, and Executive Director of the Innocence Institute; excluding the President, Vice Presidents, Associate and Assistant Vice Presidents, Deans, Department Chairs, Program Director, Applied Corporate Communications; Program Director, Cinema and Digital Arts; Program Director, Master of Science in Engineering Management; Program Director, Master of Business Administration, and all office clerical employees, part-time faculty, non-professional employees, managerial employees and guards, other professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about July 26, 2004, the Union, by letter, requested the Respondent to bargain, and, since August 4, 2004, the Respondent has refused to do so. We find that the Respondent's refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 4, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Point Park University, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time faculty, Conservatory of Performing Arts teaching artists, Natural Sciences and Engineering Technology laboratory associates, Director of the Library, Head of Graduate Studies in COPA, and Executive Director of the Innocence Institute; excluding the President, Vice Presidents, Associate and Assistant Vice Presidents, Deans, Department Chairs, Program Director, Applied Corporate Communications; Program Director, Cinema and Digital Arts; Program Director, Master of Science in Engineering Management; Program Director, Master of Business Administration, and all office clerical employees, part-time faculty, non-professional employees, managerial employees and guards, other professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 17, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL–CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time faculty, Conservatory of Performing Arts teaching artists, Natural Sciences and Engineering Technology laboratory associates, Director of the Library, Head of Graduate Studies in COPA, and Executive Director of the Innocence Institute; excluding the President, Vice Presidents, Associate and Assistant Vice Presidents, Deans, Department Chairs, Program Director, Applied Corporate Communications; Program Director, Cinema and Digital Arts; Program Director, Master of Science in Engineering Management; Program Director, Master of Business Administration, and all office clerical employees, part-time faculty, non-professional employees, managerial employees and guards, other professional employees and supervisors as defined in the Act.

POINT PARK UNIVERSITY